Supreme Court, U.S.
FILED
JUL 1 1994
OFFICE OF THE CLERK

(1)

No. 9411

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILSON VELEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
2600 Douglas Road
Penthouse II
Coral Gables, Florida 33134
(305) 446-2020

Counsel for Petitioner

28 pp

QUESTION PRESENTED

WHETHER THE DISMISSAL OF THE PETITIONER'S APPEAL BY THE COURT OF APPEALS BASED SOLELY UPON THE PETITIONER'S STATUS AS A FORMER FUGITIVE CONFLICTS WITH *ORTEGA-RODRIGUEZ v. UNITED STATES*, ___ U.S. ___, 113 S.Ct. 1199 (1993).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF AUTHORITIES	3
OPINION BELOW	4
JURISDICTION	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
ARGUMENT	6
CONCLUSION	9
APPENDIX	APP. 1-17

TABLE OF AUTHORITIES

Cases **Page**

Allen v. Georgia,
166 U.S. 138, 17 S.Ct. 525 (1897) 7

Molinaro v. New Jersey,
396 U.S. 365, 90 S.Ct. 498 (1970) 6

Ortega-Rodriguez v. United States,
___ U.S. ___, 113 S.Ct. 1199 (1993) 1, 5, 6, 8

Smith v. United States,
94 U.S. 97 (1876) 6

United States v. Ortega-Rodriguez,
13 F.3d 1474 (11th Cir.1994) 5-8

United States v. Rosales,
13 F.3d 1461 (11th Cir.1994) 8

United States v. Sudthisa-Ard,
17 F.3d 1205 (9th Cir.1994) 8

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported. A copy of the opinion appears in the appendix at App. 1-2. The Eleventh Circuit denied rehearing on March 28, 1994. A copy of the order of denial appears in the appendix at App. 3.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on November 10, 1993. (App. 1-2). The Eleventh Circuit denied rehearing on March 28, 1994. (App. 3). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to July 15, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner was charged along with Jose Borges and Geraldo Borges in a one-count indictment with conspiracy to possess cocaine with intent to distribute. A jury found the petitioner guilty as charged and he was sentenced to a term of incarceration. The petitioner timely appealed to the United States Court of Appeals for the Eleventh Circuit. The government moved for dismissal claiming that the petitioner was a fugitive having failed to report to the authorities to commence service of his sentence. (App. 4-7). While the motion to dismiss the appeal was pending, the petitioner was taken into federal custody and commenced serving his sentence, whereupon the petitioner requested that the court of appeals deny the government's motion to dismiss. (App. 8-9). The court of appeals dismissed the appeal finding that the petitioner was "no longer entitled to call upon the resources of this court" based upon his status "... as a fugitive during the ongoing appellate process." (App. 2).

The petitioner filed a "Petition for Rehearing and Remand to the District Court" (App. 10-13) and a "Supplementary Petition for Rehearing and Motion for Reinstatement of Appeal." (App. 14-17). Relying upon this Court's decision in *Ortega-Rodriguez v. United States*, ___ U.S. ___, 113 S.Ct. 1199 (1993), and the decision of the court of appeals upon remand from this Court in *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir.1994), the petitioner alleged that he was entitled to an appeal because the granting of an appeal would not likely result in an undue burden on the government (because government witnesses remained available in the event of retrial) and the petitioner's flight had not resulted in significant interference with the operation of the judicial process in either the district court or the appellate court (because the appeal of co-appellant Geraldo Borges was pending and the addition of the petitioner's appeal would cause no delay).

The court of appeals denied the petitioner's rehearing petition without reasons. (App. 3).

REASONS FOR GRANTING THE WRIT

In *Ortega-Rodriguez v. United States*, *supra*, this Court directed the Eleventh Circuit to abandon its "automatic dismissal" rule and formulate a discretionary rule that tied the appellate sanction for flight to the harm or disruption it caused the appellate process. Upon remand, the court of appeals announced a new two-pronged rule, holding that:

> this court should dismiss a former fugitive's appeal unless the defendant can show that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not result in significant interference with the operation of the judicial process in either the district court or the appellate court.

Ortega-Rodriguez, 13 F.3d at 1476

In the case at bar, the court of appeals has, in effect, returned to its automatic dismissal rule. Despite the petitioner's unrebutted showing on both prongs, the court of appeals dismissed his appeal without regard to any burden upon the government or interference with the judicial process. The failure of the court of appeals to have implemented the mandate of this Court and the possibility that other courts of appeals will do the same warrants certiorari review.

ARGUMENT

The government moved to dismiss the petitioner's appeal citing his failure to report to the authorities to commence service of his term of imprisonment. The court of appeals issued the decision sought to be reviewed, dismissing the petitioner's appeal, and holding in pertinent part as follows:

> That appellate courts may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal has been well settled for more than a century. E.g. Smith v. United States, 94 U.S. 97 (1876). The Court has held that dismissal of appeal is an appropriate sanction because escape disentitles the defendant to call upon the resources of the court for determination of his claims. Molinaro v. New Jersey, 90 S.Ct. 498, 499 (1970) (per curiam). The rationale underlying Molinaro is that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." Ortega-Rodriguez v. United States, 113 S.CT. 1199 (1993). The Supreme Court has also upheld not only a state court's dismissal of a fugitive's appeal but also its

> refusal to reinstate the appeal after the defendant's recapture. E.g. Allen v. Georgia, 17 S.Ct. 525, (1897). Thus, dismissal is an appropriate sanction when a prisoner is a fugitive during the ongoing appellate process.
>
> As a sanction for the contempt for the appellate process manifested by the appellant's flight, and to deter the crime of escape and encourage voluntary surrender, we find that appellant is no longer entitled to call upon the resources of this court.

(App. 2).

The petitioner timely sought rehearing. (App. 10-13). While the petition for rehearing was pending, the court of appeals issued its decision in *Ortega-Rodriguez* upon remand from this Court. The petitioner filed a supplementary petition for rehearing and motion for reinstatement of appeal. (App. 14-17). The petitioner relied upon the new two-pronged test announced by the court of appeals under which a former fugitive's appeal would be dismissed absent a demonstration that: (1) granting the appeal is not likely to result in an undue burden on the government; and (2) the flight has not resulted in nor will not result in significant interference with the operation of the judicial process in either the district court or the appellate court. *United States v. Ortega-Rodriguez, supra.*

The petitioner demonstrated that both prongs of the new rule were met. No undue burden upon the government was likely to result from granting the petitioner an appeal because in the event of retrial, the government's key witnesses (an informant in custody and a case agent) remained available. Nor did the petitioner's alleged flight result in any interference with the courts. The appeal of co-appellant Geraldo Borges was pending at the time and the petitioner's

case could be heard at the same time with no delay or interference with the judicial process. The government made no showing that the two-pronged test was not met. The court of appeals denied rehearing without comment. (App. 3).

The dismissal of the petitioner's appeal contains no findings evincing the application of the type of discretionary rule required by this Court in *Ortega-Rodriguez* which ties the appellate sanction for flight to disruption of the appellate process. Such a dismissal stands in stark contrast to cases such as *United States v. Sudthisa-Ard*, 17 F.3d 1205 (9th Cir.1994), *United States v. Rosales*, 13 F.3d 1461 (11th Cir.1994) and *United States v. Ortega-Rodriguez*, *supra*, where the courts correctly responded to this Court's mandate in *Ortega-Rodriguez* by analyzing whether the fugitive status of the appellants in those cases affected the appellate process. No such analysis was undertaken by the court of appeals in the case at bar. The undisputed record establishes no disruption to the judicial process or additional burden placed upon the government. Accordingly, certiorari review is warranted to resolve the conflict.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted and that this Court order the Eleventh Circuit to reinstate the petitioner's appeal. Alternatively, the Court is requested to order the Eleventh Circuit to remand the cause to the district court for findings of fact regarding the petitioner's status as a fugitive.

Respectfully submitted,

PAUL MORRIS
Counsel of Record
2600 Douglas Road
Penthouse II
Coral Gables, FL 33134
(305) 446-2020

Counsel for Petitioner

DATED: June 1994.

APPENDIX

Index

	APP.
DECISION SOUGHT TO BE REVIEWED	1-2
ORDER DENYING REHEARING	3
GOVERNMENT'S MOTION TO DISMISS APPEAL, etc.	4-7
RESPONSE TO GOVERNMENT'S MOTION TO DISMISS, etc	8-9
PETITION FOR REHEARING, etc.	10-13
SUPPLEMENTARY PETITION FOR REHEARING, etc.	14-17

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 92-8865

FILED
U.S. COURT OF APPEALS
NOV 10 1993

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILSON VELEZ and
GERALDO BORGES,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Before FAY, EDMONSDON and DUBINA, Circuit Judges.

BY THE COURT:

During the ongoing process of this appeal Mr. Velez, the appellant, failed to report to the authorities to serve his sentence. The government moved for dismissal for abandonment of appeal.

Before the court announced its decision, Mr. Velez was once again taken into federal custody. Velez then responded, asking this court to deny the motion to dismiss his appeal. Under these circumstances, we decline to adjudicate his case.

That appellate courts may dismiss the appeal of a

defendant who is a fugitive from justice during the pendency of his appeal has been well settled for more than a century. E.g. Smith v. United States, 94 U.S. 97 (1876). The Court has held that dismissal of appeal is an appropriate sanction because escape disentitles the defendant to call upon the resources of the court for determination of his claims. Molinaro v. New Jersey, 90 S.Ct. 498, 499 (1970) (per curiam). The rationale underlying Molinaro is that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." Ortega-Rodriguez v. United States, 113 S.CT. 1199 (1993). The Supreme Court has also upheld not only a state court's dismissal of a fugitive's appeal but also its refusal to reinstate the appeal after the defendant's recapture. E.g. Allen v. Georgia, 17 S.Ct. 525, (1897). Thus, dismissal is an appropriate sanction when a prisoner is a fugitive during the ongoing appellate process.

As a sanction for the contempt for the appellate process manifested by the appellant's flight, and to deter the crime of escape and encourage voluntary surrender, we find that appellant is no longer entitled to call upon the resources of this court. Appellee's motion to dismiss defendant Velez's appeal is GRANTED.

Appellee's motion to stay briefing schedule pending decision on dismissal is GRANTED. Appellee's brief is due 35 days from the date of this order.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8865

FILED
U.S. COURT OF APPEALS
MAR 28 1994

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILSON VELEZ and
GERALDO BORGES,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

Before FAY, EDMONSDON and DUBINA, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Wilson Velez, is denied.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
United States Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

v. APPEAL NO. 92-8865

GERALDO BORGES &
WILSON VELEZ

GOVERNMENT'S MOTION TO DISMISS DEFENDANT VELEZ' APPEAL AND TO STAY BRIEFING SCHEDULE PENDING DECISION OF THE DISMISSAL ISSUE

Comes now the United States of America, by and through counsel, Joe D. Whitley, United States Attorney, and Mary Jane Stewart, Assistant United States Attorney, and in support of this motion shows the following:

I.

Defendant was convicted by jury trial on June 3, 1992. (Exhibit A-10). [footnote omitted] On August 19, 1992, defendant was sentenced by the district court to serve 292 months' incarceration. (Exhibit A-11). The district court, over the government's objection, permitted the defendant to voluntarily surrender for service of sentence. Counsel for defendant filed a notice of appeal. (Id.). Defendant has failed to surrender for service of his sentence and remains a fugitive. (See Exhibit B) [footnote omitted].

"It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal."

Ortega-Rodriguez v. United States, 61 U.S.L.W. 4225, 4227 (March 8, 1993). In Molinaro v. New Jersey, 396 U.S. 365, 366 (1970), the Court stated:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

The recent decision in Ortega-Rodriguez in no way undermines the Government's position that defendant Velez's appeal should be dismissed.

> Thus, our cases consistently and unequivocally approve dismissal as an appropriate sanction when a prisoner is a fugitive during "the ongoing appellate process." Moreover, this rule is amply supported by a number of justifications. In addition to addressing the enforceability of concerns identified in Smith v. United States, 94 U.S. 97 (1876), and Bohanan v. Nebraska, 125 U.S. 692 (1887), dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient dignified appellate practice. Estelle, 420 U.S. at 537.

Ortega-Rodriguez, 61 U.S.L.W. at 4228.

Having fled and failed to surrender for service of his sentence, Velez has "disentitled [himself] to call upon the resources of the Court for determination of his claims." Molinaro v,. New Jersey, 396 U.S. at 366. This, his appeal

should be dismissed.

WHEREFORE, the government respectfully requests that the Court DISMISS Velez's appeal.

II.
[omitted]

III.
[omitted]

Respectfully submitted,

JOE D. WHITLEY
UNITED STATES ATTORNEY

/s/
MARY JANE STEWART
ASSISTANT UNITED STATES ATTORNEY
1800 United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335
404/331-6316
Georgia Bar No. 681650

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery:

Frank J. Petrella, Attorney
Suite 600 - The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

and

Paul Morris, Attorney
2600 Douglas Road, Penthouse II
Coral Gables, Florida 33134

Dated: This 12th day of April, 1993

/s/ MARY JANE STEWART
ASSISTANT UNITED STATES
ATTORNEY

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Case No. 92-8865

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

WILSON VELEZ,

Defendant, Appellant.

_____/

RESPONSE TO GOVERNMENT'S MOTION TO DISMISS APPEAL AND SUGGESTION OF MOOTNESS

The appellant, Wilson Velez, through undersigned counsel, respectfully requests that the Government's motion to dismiss appeal be denied and/or suggests that the motion to dismiss is moot and states:

The Government has sought dismissal of the appellant's appeal on the ground that he is a fugitive. The appellant is presently in federal custody in Miami, Florida and has been remanded by Magistrate Judge Brown to the United States Marshal's Service to commence service of his sentence.

WHEREFORE, the appellant respectfully requests that the Government's motion to dismiss be denied and/or treated as moot.

Respectfully submitted,
LAW OFFICES OF PAUL MORRIS, P.A.
2600 Douglas Road
Penthouse II
Coral Gables, FL 33134
(305) 446-2020

/s/ PAUL MORRIS
Counsel for Wilson Velez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was mailed to Mary Jane Stewart, Assistant United States Attorney, Office of the United States Attorney, United States Courthouse, Richard Russell Building, 75 Spring Street, S.W., Atlanta, Georgia 30303, and to Frank J. Petrella, 44 Broad Street, Grant Building, Suite 600, Atlanta, Georgia 30303, this 11th day of October, 1993.

/s/ PAUL MORRIS

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 92-8865

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

WILSON VELEZ,

Defendant, Appellant.

_____/

PETITION FOR REHEARING AND REMAND TO THE DISTRICT COURT

The appellant, Wilson Velez, through undersigned counsel, respectfully requests that the court rehear the order dismissing this appeal and remand to the district court for fact-finding and states:

1. Following a jury trial, the appellant was convicted of conspiracy and sentenced to a term of imprisonment for 292 months.

2. The appellant was released upon bail during the trial and after conviction. Following sentencing on August 19, 1992, the appellant was allowed to remain at liberty pending surrender to the authorities.

3. The appellant filed a timely notice of appeal on August 24, 1992.

4. On September 3, 1992, the appellant filed with the district court a "Motion for Order Directing Defendant to Surrender to Prison Designated by Bureau of Prisons." The docket sheet reveals no ruling.

5. The appellant filed in this court a timely opening brief challenging his conviction and sentence.

6. The appellee moved to dismiss the appeal on the ground that the appellant had failed to surrender to the authorities to serve his sentence.

7. The appellant was taken into custody and commenced serving his sentence.

8. On November 10, 1993, this court entered an order granting the appellee's motion to dismiss the appeal.

9. The Supreme Court's most recent pronouncement related to the issue at hand arose from this court. In *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199 (1993), the defendant was tried and convicted of various offenses and failed to appear for sentencing. The defendant was sentenced *in absentia* and a warrant was issued for his arrest. Eleven months later, the defendant was apprehended. The defendant was indicted and convicted of contempt of court and failure to appear. The district court granted the defendant's motion to vacate sentence and resentenced the defendant. The defendant filed a notice of appeal to this court. The government moved to dismiss on the ground that the defendant had become a fugitive after his conviction and before his initial sentencing. This court granted the motion to dismiss.

The Supreme Court reversed, holding that when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of

connection to the appellate process that would justify an appellate sanction of dismissal. The Supreme Court noted that dismissal remains an appropriate sanction when a convicted defendant is a fugitive during the ongoing appellate process due to the following justifications: concerns about the enforcement of the appellate court's judgment against the fugitive; the belief that flight disentitles the fugitive to relief; the desire to promote the efficient operation of the appellate process and to protect the dignity of the appellate court; and the view that the threat of dismissal deters escape.

10. The problem with applying these justifications for dismissal in the case at bar is the absence of a sufficient record. The facts surrounding the release of the appellant, his understanding of his surrender obligations, and whether there was adequate notice, are unclear at best. The government's motion to dismiss was based almost exclusively upon the affidavit of a pretrial services officer which alleges that the appellant "was to surrender on September 9, 1992", but which offers no documentation or notice in support. Nor does the affidavit mention the appellant's motion filed with the district court seeking voluntary surrender to the prison upon designation, although the affidavit does allege an extension of the surrender date was sought and denied, but again without supporting documentation.

11. Depending upon the facts, the variables recognized in *Ortega-Rodriguez* which render dismissal appropriate may not be applicable. For example, this court's judgment remains enforceable; the efficient operation of this court may not have been impaired; and the district court and the government have numerous alternative remedies such as contempt or charging failure to appear if there are supporting facts. By way of further example, it is not known if the defendant believed that he was to surrender upon notification of designation from the Bureau of Prisons and if so, whether that belief was reasonable.

12. Remand to the district court for determination of the facts surrounding the appellant's obligations is thus requested.

WHEREFORE, the appellant respectfully requests that the court grant rehearing and remand to the district court for appropriate findings.

Respectfully submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
2600 Douglas Road
Penthouse II
Coral Gables, FL 33134
(305) 446-2020

/s/ PAUL MORRIS
Counsel for Wilson Velez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition was mailed to Mary Jane Stewart, Assistant United States Attorney, Office of the United States Attorney, United States Courthouse, Richard Russell Building, 75 Spring Street, S.W., Atlanta, Georgia 30303, and to Frank J. Petrella, 44 Broad Street, Grant Building, Suite 600, Atlanta, Georgia 30303, this 29th day of November, 1993.

/s/ PAUL MORRIS

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 92-8865

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

WILSON VELEZ,

Defendant, Appellant.

_____/

SUPPLEMENTARY PETITION FOR REHEARING;
AND
MOTION FOR REINSTATEMENT OF APPEAL

The appellant, Wilson Velez, through undersigned counsel, respectfully supplements his petition for rehearing and also moves for reinstatement of his appeal based upon the following grounds:

1. Following a jury trial, the appellant was convicted of conspiracy and sentenced to a term of imprisonment for 292 months.

2. The appellant was released upon bail during the trial and after conviction. Following sentencing on August 19, 1992, the appellant was allowed to remain at liberty pending surrender to the authorities.

3. The appellant filed a timely notice of appeal on August

24, 1992.

4. On September 3, 1992, the appellant filed with the district court a "Motion for Order Directing Defendant to Surrender to Prison Designated by Bureau of Prisons." The docket sheet reveals no ruling.

5. The appellant filed in this court a timely opening brief challenging his conviction and sentence.

6. The appellee moved to dismiss the appeal on the ground that the appellant had failed to surrender to the authorities to serve his sentence.

7. The appellant was taken into custody and commenced serving his sentence.

8. On November 10, 1993, this court entered an order granting the appellee's motion to dismiss the appeal. The appellant filed a petition for rehearing, which is pending, relying in part upon *Ortega-Rodriguez v. United States*, 113 S.Ct. 1199 (1993) in which the Supreme Court rejected this court's "automatic dismissal" rule (under which a defendant who flees after conviction but before sentencing waives his right to appeal unless he shows his absence was due to matters beyond his control).

9. In his rehearing petition, the appellant requested remand for determination of certain evidentiary matters. However, in view of this court's decision issued on February 10, 1994 on remand from the Supreme Court in *Ortega-Rodriguez*, an evidentiary hearing is not required. In *United States v. Ortega-Rodriguez*, No. 91-5083 (11th Cir. February 10, 1994), this court held that a former fugitive's appeal will be dismissed unless he can show that: (1) granting the appeal is not likely to result in an undue burden on the government; and (2) the defendant's flight has not resulted in nor will not

result in significant interference with the operation of the judicial process in either the district court or the appellate court.

10. This appeal satisfies both prongs of *Ortega-Rodriguez*. First, reinstatement of the appeal will not likely result in an undue burden on the government. The crux of the prosecution consisted of a cooperating witness who is in government custody and a government agent. The other witnesses and evidence also remain available in the event of retrial. Thus, availability of evidence and witnesses in the event of remand, which this court found in *Ortega-Rodriguez* to be among the considerations relevant to the first prong, militate in favor of reinstatement.

As for the second prong, there is no significant interference with the district court or appellate court. In *Ortega-Rodriguez*, this court held the second prong can be measured by duplication of efforts. The government must make the same or similar defense of the appellant's conviction as that made in the appeals of co-appellants Jose Borges and Geraldo Borges. Moreover, consolidation of the appeals obviates the need for more than one panel of judges. Finally, there has been no interference with the operation of the district court. Thus, due to the absence of any significant duplication of efforts, the second prong is satisfied as well.

WHEREFORE, the appellant respectfully requests that the court grant rehearing and reinstate this appeal.

Respectfully submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
2600 Douglas Road
Penthouse II
Coral Gables, FL 33134
(305) 446-2020

/s/ PAUL MORRIS
Counsel for Wilson Velez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to Mary Jane Stewart, Assistant United States Attorney, Office of the United States Attorney, United States Courthouse, Richard Russell Building, 75 Spring Street, S.W., Atlanta, Georgia 30303, and to Frank J. Petrella, 44 Broad Street, Grant Building, Suite 600, Atlanta, Georgia 30303, this 1st day of March, 1994.

/s/ PAUL MORRIS